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IN THE

# Supreme Court of the United States

October Term, 1965
No. 856

BLAINE J. LORD, EDYTHE M. KERBER, et al.,
Petitioners,

versus

ROY T. HELMANDOLLAR, ETC., et al.,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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## INDEX


| | Page |
|---|---|
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| QUESTIONS PRESENTED | 2 |
| STATUTES, FEDERAL RULES, AND REGULATIONS INVOLVED | 2, Appendix F |
| STATEMENT | 2 |
| REASONS FOR GRANTING WRIT | 6 |
| CONCLUSION | 17 |
| APPENDIX | 19, et seq. |


## CITATIONS

### Cases Cited


Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., 371 U.S. 215 (1862) ..... 6, 14, 15

Hill v. Hawes, 320 U.S. 520 (1944) ..... 11

Lieberman v Gulf Oil Corporation, 315 F 2d 403 (1963) ..... 14

Thompson v. Immigration & Naturalization Service, 375 U.S. 384 (1964) ..... 6

Wolfsohn v. Hankin, 376 U.S. 203 (1964) ..... 6


### Statutes and Rules


Federal Rules of Civil Procedure:

Rule 5 ..... 11

Rule 60(b) ..... 10

Rule 73(a), 28 USC §2107 ..... 5, 10, 13, 14

Rule 77(d) ..... 11, 13, 14


### Miscellaneous


Restatement of the Law of Agency, 2d, Comments c, d. ..... 12

Report of Proposed Amendments to Rules of Civil Procedure for the District Court of the United States, generally, 6, 94-95, 106-108, (1946) ..... 13

IN THE

# Supreme Court of the United States

October Term, 1965

No. _____

BLAINE J. LORD, EDYTHE M. KERBER, et al.,

Petitioners,

versus

ROY T. HELMANDOLLAR, individually and as Manager of the Phoenix, Arizona Land Office, Bureau of Land Management, et al.,

Respondents

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals, for the District of Columbia Circuit entered in the above case on June 10, 1965; petition for rehearing denied on Septemebr 8, 1965.

### Opinion Below

The judgment of the United States District Court for the District of Columbia, granting respondent's motion for summary judgment is not reported; the formal written judgment is set forth in Appendix A to this Petition. Its order, vacating and re-entering the judgment or order is set forth in Appendix B to this petition.

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 9 FR Serv. 2d 73.54, Case 1. For the convenience of the Court, a copy is provided in Appendix C hereto.

## Jurisdiction

The judgment of the Court of Appeals for the District of Columbia Circuit (Appendix C, **infra.**) was made and entered on June 10, 1965. A motion for an extension of time for filing of petition for rehearing was granted, (Appendix D, **infra.** pp. 1-2). The petition for re-hearing, timely filed, was denied on September 8, 1965, (Appendix E, **infra**). The jurisdiction of this Court is invoked under 28 U.S. Code, §1254(1).

## Questions Presented

Whether, under the situation, the facts of which were familiar to the trial judge, the appellate court should have left undisturbed, under the rule in Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc. the district court's action in vacating the original judgment and in reentering a new one from which appellant filed the notice of appeal 20 days after?

Whether it was competent of the trial judge, in the exercise of discretion, upon terms, under the situation, to be just, to relieve a party, who never learned of the trial court's decision and the entry of judgment because of inadvertence, excusable neglect or mistakes of third persons,—that of counsel of other party, and of local counsel and of the clerk of court,—of a judgment and to reenter a new one as prayed for in a motion?

## Statutes Involved

The following statutory provisions, in parts as are pertinent are set forth in Appendix F, **infra.** pp. 1-3: Rule 5(a), (b); Rule 6(b); Rule 60(b); Rule 73(a); Rule 77(d), Federal Rules of Civil Procedure; and 28 USC §2107.

## Statement

This action was brought in the United States District Court in the District of Columbia by Petitioners to review the Department of Interior decisions declaring null and void

Petitioners' locations of placer mining claims on federal public lands in Arizona upon the agency's chief witness who gave evidence of value of the minerals based on quantitative analyses of only one sample of ore that would fill a cereal bowl and taken at only one spot to show the amount of minerals present in four separate mining claims comprising a section of land, while the other agency witnesses gave a showing of minerals over the four claims which could be extracted at a profit by low-grade mining employed in Arizona and recognized by said state's supreme court.[1] The complaint was prepared and filed by the petitioners' Arizona attorney. Upon filing the complaint the Arizona attorney suggested the name of a local Washington, D.C. counsel to file an appearance in the case. Subsequently thereafter, motions, opposition to motions, memorandum of points and authorities, request for taking depositions, statements and other papers were prepared, and practically all signed by the Arizona counsel or his name appearing as attorney for Petitioners. (JA-2-31)[2], (JA-37, 38-41, 43-44, 45-49, 75-76, 78, 82, 83, 87-89). Generally, certificate or affidavit of services of process were made directly by the Arizona attorney upon the Respondents and their counsel. Usually, Respondents in responde mailed two copies of the papers they wanted to serve upon the petitioners, one for the Arizona attorney and another for the local counsel. Arguments and hearings were personally attended and conducted by the Arizona counsel, by himself, appearing before the court in Washington, D.C. (JA-57-73).

Respondents having filed and served a motion for summary judgment, the District Court set the hearing for September 11, 1963. Before the setting of the hearing, the local

[1]At the hearing of the government's motion for summary judgment in the District Court, the government counsel claimed that "even if it (agency's decision) were corrupt, it would still be right" (JA-20).

[2]JA refers to Joint Appendix; numerals to pages therein.

counsel left the country (for the Philippines) and remained absent during August, September, and October, 1963. (JA-78-79). He was, at the time, practicing law alone.

The cause was regularly heard in the District Court before Hon. Edward A. Tamm, Judge, on September 11, 1963. The Arizona attorney appearing in person alone argued to the court for the Petitioners in opposition to the Respondents' counsel. (JA-57-73). The cause having been submitted, the trial court rendered its decision on September 30, 1963, granting summary judgment in favor of Respondents and judgment entered then.

The Clerk of court did not serve a notice of the entry of judgment on Petitioners, either on the local counsel or on the Arizona attorney, who tried the case; neither did the Respondents and their counsel give notice. However, Respondents' counsel prepared a formal written order or judgment thereof and mailed a copy to the local counsel who was at the time out of the country. (JA-78-79). No copy of such formal written order or judgment was served on the Arizona trial counsel, or was ever received by him. (Infra Appendix A). When the local counsel returned to this country and to his office, "he assumed a copy of the said Judgment was mailed" to the Arizona trial counsel, in Tucson, Arizona, "by one of the attorneys for defendants, and therefore no copy of this Judgment was ever mailed" by local counsel to the trial counsel. (JA-78-79).

The Arizona trial counsel expected under these circumstances and under Rule 77(d) to be served notice of the entry of judgment from the clerk or from the other party. He never learned of the entry of judgment, until the petitioners were served papers by the government seeking to evict them from their mining locations.

Forthwith, petitioners filed, on February 4, 1964, in the trial court a "Motion for order to vacate and reenter judg-

ment or order." In their motion, they alleged that they had not learned of the entry of judgment "by reason of inadvertence and excusable neglect occasiond by unusual circumstances and the confusing fact that the attorney actually concerned and who argued the case before the Court had expected that he may be served with the judgment or notice of entry of judgment". (JA-75). Supporting affidavits were filed. (JA-76-79).

The respondents filed opposition to the motion to vacate and reenter the judgment. (JA-79-81). The District Court, having given the motion and defendants' opposition thereto careful consideration, granted the motion to vacate and to reenter the judgment on February 17, 1964. (JA-81-82). Twenty days later, on March 9, 1964, Petitioners filed a notice of appeal. On April 17, 1964, respondents cross-appealed, collaterally attacking the ruling of District Court in granting appellants' motion to vacate and to re-enter judgment, on the ground that the notice of appeal was untimely pursuant to Rule 73(a), Fed. R. Civ. Proc.

Appellants[1] pursued their appeal in the United States Court of Appeals for the District of Columbia; filed briefs on the merits and answering brief opposing appelles cross-appeal to have the appellants' appeal dismissed, and argued the matters on appeals to the court below on March 30, 1965. The court below heard the parties' counsel argue; much of their time was devoted over the merits of the case on appeal. The court below rendered its decision on June 10, 1965, dismissing the Petitioners' appeal for lack of jurisdiction, on the ground that the granting of the appellants' motion to vacate and re-enter the judgment by the District Court had no effect on the running of their time for appeal.

[1]For convenience, petitioners are referred to as appellants, as in the court below, and the respondents, as appellees.

Upon a timely motion for an order enlarging the time for appellants to file a petition for rehearing, the court below, on July 13, 1965, granted appellants to file the petition for rehearing to July 20, 1965. Appellants filed their petition for rehearing within the time. The United States Court of Appeals for the District of Columbia, per curiam, denied appellants' petition for rehearing, on September 8, 1965.

**Reasons For Granting The Writ**

The decision of the Court of Appeals, dismissing the appeal of the appellants below on jurisdictional grounds, claiming that it was not timely filed, conflicts with the familiar principles of justice set up by this Court in **Harris Truck Lines, Inc., v. Cherry Meat Packers, Inc.,** 371 U.S. 215 (1962), **Thompson v. Immigration & Naturalization Service,** 375 U.S. 384 (1964), and **Wolfsohn v. Hankin,** 376 U.S. 203 (1964). It has decided the question in a way which is not in accord with the applicable principles of justice patent in the above cases, although this case fits squarely within the letter and spirit of the **Harris** case, in addition to a showing in the record of "special and extraordinary circumstances sufficient to bring the case within some acknowledged field of equity jurisprudence."

In the **Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.,** the interstate motor carrier which had its principal place of business in California sued the meat shipper in a Federal District Court in Illinois for underpayment of freight charges. A local counsel handled the trial of the case. After the court dismissed the complaint and entered judgment for the shipper on its counterclaim, and had denied the carrier's motion for a new trial, the carrier's local counsel, within the 30-day limit during which the carrier could appeal, asked for an extension of time on the ground that the carrier's general counsel, who had the sole responsibility for all cor-

porate decisions with respect to pending litigation, was vacationing in Mexico, could not be reached, and would not return to the United States until a few days before the expiration of the 30-day period. The motion judge granted an extra two weeks, on the last day of which a notice of appeal was filed, but the Court of Appeals dismissed the appeal, holding that there had been no showing of "excusable neglect based on failure of a party to learn of the entry of the judgment," within the meaning of Rule 73(a), on the grounds that notice to the carrier's attorney of record was notice to it and that its general counsel's lack of knowledge of the denial of the motion for new trial was of no avail to the carrier.

This Court vacated the judgment of the Court of Appeals, stating that (1) the District Court properly entertained the motion even though it was made before the expiration of the initial 30-day period, (2) a trial judge's finding of "excusable neglect" prior to the expiration of the 30-day period which is relied upon by the appellant should be given great deference by the reviewing court, and (3) the record contained circumstances that the Court of Appeals should not have disturbed the District Court's ruling.

Here, as in Harris case, there were, for appellants, two counsel, residing at two different distant places, one a local counsel, and the other a general counsel. In the Harris case, the local counsel was the trial counsel. In this case, the Arizona attorney for appellants conducted the prosecution of the case as the trial counsel. He had prepared all the pleadings, motions and all papers, also certified service of processes, managed, planned and conducted the strategy of litigation, had the responsibility of all decisions, and had argued the case in person, contending personally in court with the adversary counsel, thus, in actual fact, was dealing

with them "at arm length." It is natural and logical, therefore, and he has the right, for him to expect and to rely upon service of notice to himself of the entry of judgment, or of a copy of the formal written judgment, prepared by appellees' counsel, if appellants were to be precluded from appealing. Instead, appellees mailed a copy of the formal written judgment (and no notice of the entry of judgment at all) only to the local counsel (**infra, Appendix A.**) who had left the country and was away in the Philippines; they did not serve a copy to the trial Arizona attorney. It was natural and reasonable for the local counsel, on his return to this country and to Washington, D.C., over thirty days after the entry of the judgment, to assume that another copy must have been served to the trial counsel in Tucson, Arizona. Under the circumstances of the transactions carried on between the parties, such assumption is inevitable.

In the light of the events, when the court below stated (**infra, Appendix C, at p. 3**) that for various reasons the Arizona counsel had not learned of the entry of summary judgment, "although it was conceded local counsel had been promptly notified", the statement is inexact. If "notice of the entry of judgment" may be distinguished from the sending of a copy of the formal written judgment by appellees, then appellants could not have conceded that local counsel was promptly notified, since no notice of the entry of judgment was given by the clerk nor by the appellees. Since it is likely that the lower court had taken such erroneous construction, in its determination of the case, therefore, the opinion of the court below was arrived at upon an incorrect premise.

Unlike the **Harris** case, the matter of a showing of "excusable neglect" is not in question here. Further, the record contains circumstances showing that mistakes had been

committed by third persons, which are of significance in the consideration of the action of the trial judge in setting aside the judgment and reentering it. The counsel for appellees committed the mistake in mailing a copy of the formal written judgment to an absent local counsel and did not send a copy to the trial counsel, who was also appellants' attorney, in Arizona. The local counsel, coming from a long absence, made the mistake in assuming, and with good reasons, that one of appellees' counsel must have served a copy of the written judgment. And the Clerk's error is in not mailing a notice of the entry of judgment to the appellants or their counsel, at all. Of these facts, the trial judge was closely familiar, and he should have been left, by the Court of Appeals to be the better judge in dealing out the terms such as in his discretion were just thereunder, and his decision given great deference. In disturbing the District Court's ruling and action, the lower court committed error.

Should the decision of the Court of Appeals be allowed to stand, it shall open the door to a vice which the Advisory Committee on Rules never contemplated possible. Under similar circumstances, or as could be devised, a party in a suit, fortunate enough to have a motion granted or to have secured a judgment or order or proceeding in his favor, desiring to prevent the other party from post judgment motions or a chance to appeal, may well reckon on the likelihood of some inadvertence or misadventure in the communication of a notice or service of a paper by mailing only a copy of it to a local counsel, or a counsel, who for some reason or another, would less likely get the message communicated or not get it delivered on time to the counsel most concerned living in another section of this far-flung country. The reckoning could be designed and the possibilities could well be enormous. We wish to state and avow that

in this case there was no design at all, that the event was accidental. However, the pattern of mischief, laid down by the decision of the court below, shall offer a temptation which could be improved upon, unless this Court reverses it.

At the time when the petitioners learned of the entry of judgment, the 60-day period within which to appeal had lapsed, and the 30-day extension which the trial court may grant, on a party's failure to learn of the entry of judgement upon a showing of excusable neglect, had also passed. The trial judge, presented with a motion to vacate and to reenter the judgment was then confronted with a situation, obviously unjust, which would work great hardship to the petitioners, unless they were relieved of the operation of the judgment. Rule 73(a), F. R. Civ. Proc. was not vailable under the circumstances. However, the District Court has the power to relieve the hapless party of the judgment by vacating it. The plaintiff's motion for an order to vacate the judgment and to re-enter it was made pursuant to no specified rule of civil procedure, much less under Rule 73(a). It was filed within a year, about over four months from the entry of the judgment. In the record, as well as in the circumstances of which the trial judge had personal cognizance, there are showings not only of excusable neglect but also of mistakes.

In Rule 60(b), the following provision, in part, was available:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following rasons: (1) mistake, inadvertence, surprise, excusable neglect; . . . or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1),

(2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken . . ."

Under this rule, the power of the court **to relieve** a party of a final judgment **upon such terms as are just** is not limited, in the reasonable exercise of the court's discretion. The **such terms as are just** necessarily are left to the court to define. Should the trial court consider that the terms as are just to relieve a party with, in such situation or predicament and hardship as appears in the record, was to vacate the judgment and to re-enter it in order to render justice equally to both parties, there is nothing in the amended rules which prohibits the District Court from doing so, or that it is not competent for the court. On the other hand, this Court, declared positively, in **Hill v. Hawes,** 320 U.S. 520 (1944), that "it was competent for the trial judge, in view that petitioner relied upon the provisions of Rule 77(d) with respect to notice, and in the exercise of a sound discretion, to vacate the former judgment and to enter a new judgment." In the present case, Petitioners had relied on that provision of Rule 77(d) for the respondents to give them notice.

The court below has taken the position that the holding in **Hill v. Hawes** has been overruled, two years later, by the amendment of Rule 77(d) which provided in part as follows:

> Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 73(a).

Significantly, the amendment did not mention the effect of lack of notice of the entry of judgment by a party, although the foregoing statement comes right after the following provision:

> * * * but any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers.

Under the circumstances, in this case, the appellants below had relied upon such provision in Rule 77(d) with respect to notice. No notice of the entry of judgment had been served by the appellees to either the local counsel, or the trial counsel attorney-at-law of the appellants, unless the formal written judgment or order mailed by appellees to the absent local counsel may serve the function of a notice.

As such, had it been served to operate with like effect as a similar notification given to the principal or party to be affected by the judgment? The Arizona attorney, the attorney-at-law and agent of the mining locators in this case, who had also been the trial counsel throughout, may also be a party affected by the judgment. His was the responsibility and the making of all decisions and of any subsequent proceeding to take, even if the local counsel were not absent from the country. The state of mind involved, therefore, as the record shows, is that of the Arizona attorney and trial counsel. Under the law of agency, in the matter of giving notice, it is said in Restatement of the Law of Agency, 2d, §268, Comment d. as follows:

> Where state of mind is important. If the state of mind of a principal in a transaction is a factor, a notification by a third person giving information to an agent who does not communicate it to the principal does not operate with like effect as a similar notification given to the principal. This is not, however, because its effect as a notification is different, but because of its subsidiary effect in conveying information.

Under the same section, it is stated in Comment c., as follows:

> Authority to receive notifications. An agent who makes a contract for the principal is not necessarily the person to whom the other party is to give a notification in connection with it, * * "

Contend, as the appellees may, that the local counsel was an agent of the appellants, or rather a sub-agent, it is plainly indicated that on a matter where the nature of the information demanded a decision to be made, and in addition under the situation in this case, where the matter to be communicated involved the attention and consideration of the written judgment drawn up by the appellees, the local counsel was not necessarily the one to whom to give notification. The more so, where the notification concerns the transaction of a judicial business threshed out in court in which the appellees' counsel personally took part face to face with the Arizona attorney, then acting both as trial counsel and as the representative of the appellant mining locators, being their attorney at law, contesting with him over a matter as critical and decisive as a summary judgment. It follows, therefore, because of what had gone before, to expect, by ordinary process of understanding, that appellees should have served him a copy of the formal written judgment they made. Then, too, the provision of Rule 77(d) in which, in addition to that of the clerk's, the other party should give notice of the entry of judgment, became compelling thereby, by reason of the circumstances which had transpired.

The probability of an extension of the time for appeal has been foreseen by the Advisory Committee on Rules. In the Advisory Committee's Notes, we find that

> Any party may, of course, serve timely notice of the entry of a judgment upon the adverse party and thus preclude a successful application, under Rule 73(a), for the extension of the time for appeal. (Generally, Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the U.S. 6, 94-95, 106-108, 1946.

This then reveals the significance of the statement in the amended Rule 77(d), we quoted above, in which the clerk is singled out, and lack of notice of the entry of judgment by him does not affect the time of appeal or to authorize the court to relieve a party for failure to appeal. It has not thereby closed the door to appeal completely, where a party fails to give the notice of the entry of judgment. Likewise, it has not precluded the trial court to relieve a party for failure to appeal within the time allowed under any other rule outside of Rule 73(a). In this respect, the amendment has not overruled **Hill v. Hawes, supra** in which this Court holds that it is competent for the trial judge to vacate a judgment and re-enter it in view of the petitioners' reliance on Rule 77 (d), and thus revive their right to appeal commencing from the re-entry of the judgment. The Court of Appeals, in holding that the appellants' notice of appeal therefrom was not timely filed, committed error.

This we believe to be a certainty: Whatever the intention, or effect, of the efforts of the Advisory Committee on Rules, as claimed by the court below, to overrule this Court in **Hill v. Hawes,** by amendments or otherwise, it has not nor could overrule the familiar principle of fairness and that of fundamental justice, without which the administration of justice will be a barren desert of inequity, nor hope to survive; nor could it overrule the paramount power of this Court as the repository of those fundamental principles.

2. The decision of the court below is in direct conflict with the decisions of the United States Court of Appeals for the Second Circuit, on the same matter, in **Lieberman v. Gulf Oil Corporation, 315 F 2d 403 (1963).**

The above case, an action for malicious prosecution, was brought by Lieberman against the Gulf Oil Corporation and other individuals. An amended complaint dropped the in-

dividual defendants. After the trial a jury verdict for Gulf was rendered, and judgment entered on Decembr 19, 1962. A week later, apparently upon request of Gulf attorneys, the trial judge signed an order stating that "Pursuant to Federal Rule of Civil Procedure 60(a)," which relates to clerical mistakes, the judgment was amended by striking the names of the individual defendants. The Clerk physically altered the judgment as directed and mailed plaintiff's attorney a notification that "There was entered on the docket 12-26-62 * * an order & (judgment) amended"; in fact, the order was entered December 27. In response to the notice, plaintiff's attorney went to the Clerk's office to see what the amended judgment was, but was not available. Five days later he telephoned the Clerk and learned of the amended matter. Plaintiff, more than 30 days after the entry of the original judgment, filed a notice of appeal, but less than 30 days after the amended judgment. The defendants filed notice to dismiss the appeal as untimely under F.R. Civ. Proc. 73 (a). Thereupon plaintiff secured an order from the trial judge extending his time to appeal through that day on the basis of excusable neglect; a second notice of appeal was immediately filed. Defendant's motion to dismiss the appeal was immediately filed. Defendant moved to dismiss the second appeal too. The court of appeals dismissed the first appeal and denied to dismiss the second.

A strict reading to the "excusable neglect" clause of Rule 73(a) would have led to the dismissal of both appeals. However, the Second Circuit Court of Appeals says:

> A somewhat different approach seems to be dictated by the recent per curiam decision in Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., 371 U.S. 215, * * which the briefs and arguments of the parties have not mentioned.

Although the instant case does not present the precise situation of hardship found in Harris, where the extension was granted at a time when a timely appeal could still have been taken, there are enough elements of resemblance and a sufficient "showing of unique circumstances" that we feel constrained to follow the Supreme Court's lead. See also Foman v. Davis, 368 U.S. 951 * * (1962).

The Second Circuit felt closely bound to follow this Court under the doctrine in **Harris**, in spite of a contrary comment to its belief that "A motion under Rule 59(e), unlike one under 60(a), is one of those which, as provided in Rule 73(a), starts the time for appeal running anew." Of this comment, the Second Circuit says:

> It may well be, as Professor Moore intimates, Vol 6 at3878, that, despite the breath of its language, Rule 59(e) was not meant to include alterations or amendments relating to mere clerical mistakes that are correctible under Rule 60(a), even when as here motion to that end is made within the ten-day period. * * However, as we understand the approach in Harris, it would be going too far to say that when a party has excusably failed to learn that amendment of a judgment, made at the behest of his opponent within the ten-day period permitted by Rule 59(e), was in fact pursuant to Rule 60(a), the district court lacks power to grant the relatively short extension of time which is all that Rule 73(a) allows. Indeed, such a situation seems a bit closer to the language of the Rule than what Harris held to be close enough.

In the present case, there are more than enough elements to fit squarely the letter and spirit of the **Harris** case and sufficient showing in the record of "obvious great hardship"

and "showing of unique circumstances" sufficient to bring this case within some acknowledged field of equity jurisprudence to have justified the Court of Appeals for the District of Columbia Circuit to follow the per curiam opinion in Harris of this Court. But, it is unfortunate that the lower court has displayed a difficulty to recognize the justness in a cause and has shown a disposition to deviate from a course of justice laid down by this Court and followed by a sister Court of Appeals.

## Conclusion

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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## APPENDIX A

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISRICT OF COLUMBIA**

---

BLAINE J. LORD, et al.,

Plaintiffs,

v.

Civil No. 987-63

Defendants.

ROY T. HELMANDOLLAR, etc., et al.,

**JUDGMENT**

This case having come on for hearing on defendants' motion for summary judgment and plaintiff's motion for summary judgment, and the Court having heard argument of counsel and considered the material in support of both motions,

WHEREFORE, IT IS ORDERED as follows:

1. Defendants' motion for summary judgment is granted.
2. Plaintiffs' motion for summary judgment is denied.
3. Judgment is hereby entered against the plaintiffs and in favor of the defendants and the complaint is dismissed.

Dated, this 30th day of Sept., 1963.

/s/ EDWARD A. TAMM
United States Disrtict Judge

I hereby certify that on the 27th day of September, 1963, I served a copy of the foregoing proposed order on Cornelio Lopez, attorney for the plaintiffs, by depositing the same in a properly addressed prepaid envelope, in the mails addressed to him at 805 G Street, N.W., Washington, D.C.

/s/ Herbert Pittle

## APPENDIX B

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

---

LORD, et al — Plaintiffs

vs.

HELMANDOLLAR, et al — Defendants

Civil Action No. 987-63

**ORDER TO VACATE AND RE-ENTER JUDGMENT OR ORDER**

The plaintiffs' motion for order to vacate and re-enter judgment or order filed in the above entitled cause, having been given careful consideration, together with defendants' opposition thereto, also filed herein, it is by the Court, this 17 day of February, 1964,

ORDERED, That the plaintiffs' motion for order to vacate and re-enter judgment or order be, and is hereby, granted.

J. TAMM
Judge

Appendix C

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 18,625

BLAINE J. LORD, ET AL., APPELLANTS,

v.

ROY T. HELMANDOLLAR, individually and as Manager of the Phoenix, Arizona Land Office, Bureau of Land Management, et al., APPELLEES,

---

No. 18,680

ROY T. HELMANDOLLAR, individually and as Manager of the Phoenix, Arizona Land Office, Bureau of Land Management, et al., APPELLEES.

v.

BLAINE J. LORD, ET AL., APPELLEES.

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Appeals from the United States District Court for the District of Columbia

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Decided June 10, 1965

*Mr. Jose del Castillo,* of the bar of the Supreme Court of Arizona, *pro hac vice,* by special leave of court, with whom *Messrs. Cornelio O. Lopez* and *Gervasio Sese* were on the brief, for appellants in No. 18,625 and appellees in No. 18,680.

*Mr. Raymond N. Zagone,* of the bar of the Supreme Court of Texas, *pro hac vice,* by special leave of court, with whom *Assistant Attorney General Clark, Messrs. Roger P. Marquis* and *Herbert Pittle,* Attorneys, Department of Justice, were on the brief, for appellees in No. 18,625 and appellants in No. 18,680. *Mr. Edmund B. Clark,* Attorney, Department of Justice, also entered an appearance for appellees in No. 18,625 and appellants in No. 18,680.

Before BAZELON, *Chief Judge,* and BASTIAN, *Senior Circuit Judge,* and MCGOWAN, *Circuit Judge.*

PER CURIAM: This action was instituted in the District Court by appellants in No. 18,625, who are cross-appellees in No. 18,680,[1] to review Department of Interior decisions declaring null and void appellants' locations of placer mining claims on federal public lands in Arizona.[2] On September 30, 1963, the District Court granted appellees' motion for summary judgment. Appellants took no further action until February 4, 1964—more than four months after the original entry of summary judgment—at which

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[1] For convenience, we shall refer to appellants in No. 18,625—cross-appellees in No. 18,680—as appellants. Appellees in No. 18,625—cross-appellants in No. 18,680—will be referred to as appellees.

[2] Rev. Stat. §§ 2319, 2320, 2325, 2329, 2331 (1875), 30 U.S.C. §§ 22, 23, 29, 35. Appellants' locations were declared null and void on the ground that they did not contain "valuable mineral deposits." *Cf. Foster* v. *Seaton,* 106 U.S.App. D.C. 253, 271 F.2d 836 (1959).

time they filed in the District Court a "Motion for order to vacate and re-enter judgment or order." In their motion appellants alleged that for various reasons Arizona counsel had not learned of the entry of summary judgment until after expiration of the time for appeal, although it was conceded local counsel had been promptly notified. The District Court granted appellants' motion to vacate and re-enter judgment; and shortly thereafter, on March 9, 1964, appellants filed a notice of appeal from the entry of summary judgment against them. Appellees have cross-appealed from the order granting appellants' motion to vacate and re-enter judgment.

Appellees contend that appellants' appeal from the entry of summary judgment against them should be dismissed for failure to file a timely notice of appeal. Pursuant to Rule 73(a), FED. R. CIV. P., appellants had 60 days from the entry of judgment against them within which to appeal, which time could be extended, upon a proper showing, no more than 30 days. See Rule 6(b), FED. R. CIV. P. More than 90 days from the original entry of summary judgment had elapsed by the time appellants filed their motion to vacate and re-enter judgment. Unless the granting of that motion by the District Court recommenced the running of the time for appeal, therefore, appellants' notice of appeal was not timely filed.

Appellants rely on *Hill* v. *Hawes*, 320 U.S. 520 (1944), to support their contention that the time for appeal should be measured from the date on which the District Court granted their motion to vacate and re-enter judgment. In *Hill* v. *Hawes, supra*, the District Court vacated and re-entered its original judgment after the time for appeal had expired on the ground that the clerk of the court had failed to notify the plaintiff of the entry of the original judgment, as the clerk was, and still is, required to do by Rule 77(d), FED. R. CIV. P. The Supreme Court, reversing this court, held that the District Court acted

within its power and that its action operated to recommence the running of the time for appeal. Two years later, however, Rule 77(d) was amended to provide in part:

> Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 73(a).

The Notes of the Advisory Committee on Rules make clear that the purpose of these amendments was, in effect, to overrule *Hill* v. *Hawes, supra,* which potentially gave a district court the power to revive a right of appeal at any time by simply vacating and re-entering its original judgment. To provide for the situation presented in that case, Rule 73(a) was amended to permit a 30-day extension of the time for appeal "upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment. . . ." See generally Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States 6, 94-95, 106-08 (1946).

It follows from what has been said that the granting of appellants' motion had no effect on the running of their time for appeal. Accordingly, we dismiss their appeal for lack of jurisdiction.[3] See *Randolph* v. *Randolph,* 91

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[3] Appellants have not suggested that the Supreme Court's decisions in *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962), *Thompson* v. *Immigration & Naturalization Service*, 375 U.S. 384 (1964), and *Wolfsohn* v. *Hankin*, 376 U.S. 203 (1964), point to a different result. In those cases, during the appropriate time for filing an appeal, the District Court acted, albeit erroneously, in a manner which could have caused the losing party reasonably to believe it could initiate a timely appeal at a later date. The Supreme Court held in each case that the losing party should not be deprived of an appeal because it relied on the erroneous district court action. In this case, on the other hand, the District Court took no action at all during the maximum possible time

U.S.App.D.C. 170, 198 F.2d 956 (1952). Furthermore, since our holding that the District Court's order in no way affected the time for appeal moots appellees' claim that the order was an improper extension of time for appeal, appellees' cross-appeal is also dismissed.

*Appeals dismissed.*

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for initiating an appeal, that is to say, within the 90-day period following the original entry of summary judgment. Consequently, appellants' failure to file a notice of appeal within that period in no way could have been caused by reliance on action by the District Court.

## APPENDIX D

## UNITED STATES COURT OF APPEALS
## FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**Nos. 18,625 and 18,690**

---

BLAINE J. LORD,
EDYTHE M. KERBER, et al.,
Appellants,
Cross-Appellees,

vs.

ROY T. HELMANDOLLAR, etc., et al.,
Appellants,
Cross-Appellees.

| | |
|---|---|
| United States Court of Appeals<br>for the District of Columbia Circuit<br>Filed June 25, 1965<br>NATHAN J. PAULSON<br>Clerk | THIS MOTION IS HEREBY<br>GRANTED<br>/s/ DLB<br>Chief Judge<br>Dated July 13, 1965 |

### MOTION FOR ORDER ENLARGEMENT OF TIME FOR FILING PETITION FOR REHEARING

COMES NOW the Appellants, and respectfully move the Court, pursuant to Rule 31, General Rules of the United States Court of Appeals, For the District of Columbia Circuit, for an Order enlarging the time for filing appellants' petition for Rehearing to and including the 20th day of July, 1965, on the following grounds:

1. That the attorney handling the above-entitled cause lives and has his office outside of the District of Columbia and in Arizona, and that first class mail, in which the deci-

sion of the Court has been mailed, cut down substantially the time within which appellants' petition for rehearing may file, as well as the time for transit of the petition from Arizona to Washington, D.C. for filing.

2. The Arizona attorney is currently occupied with two urgent writ of prohibition matters and two criminal trials in the next ten days and is hard-pressed for time, including for printing.

3. That appellants have meritorious grounds for a rehearing and that this motion is not intended for delay.

/s/ GERVASIO G. SESE
LOPEZ & SESE,
Local Attorneys
610 Central Bldg.,
Washington, D.C.
/s/ JOSE DEL CASTILLO, Esq.
99 South Church Avenue
Tucson, Arizona
Tucson, Ariz.
of Counsel for Appellants

---

**CERTIFICATE OF SERVICE**

I, the undersigned attorney, hereby certify that on the 19th day of June, 1965, I served a copy of the within motion MOTION FOR ORDER ENLARGING OF TIME FOR FILING PETITTION FOR REHEARING, by mailing a copy of same, placed in an envelope, postpaid by airmail, addressed to Mr. Roger P. Marquis, Chief, Appeal Section, Department of Justice, attorneys for Appellees and Cross-appellants, Department of Justice, Washington, D.C.

/s/ GERVASIO G. SESE
Counsel for Appellants.

APPENDIX E

**UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

---

**No. 18,625**

---

September Term, 1964

BLAINE J. LORD, et al.,
Appellants

v.

ROY T. HELMANDOLLAR, et al.,
Appellees

---

**No. 18,680**

---

ROY T. HELMANDOLLAR, individually and as Manager of the Phoenix, Arizona, Land Office, Bureau of Land Management, et al.,
Appellants

v.

BLAINE J. LORD, et al.,
Appellees

United States Court of Appeals
for the District of Columbia Circuit
Filed Sept. 8, 1965
NATHAN J. PAULSON
Clerk

Before: Bazelon, Chief Judge,
Bastian, Senior Circuit Judge,
and McGowan, Circuit Judges,
in Chambers.

**ORDER**

On consideration of the petition for rehearing filed herein by Blaine J. Lord and Edythe M. Kerber, et al., it is

ORDERED by the court that the aforesaid petition for rehearing is denied.

Per Curiam.

Dated: Sept. 8, 1965

## APPENDIX F

**Rule 5**

**(a) * * * * Every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every written motion * * * and every written notice, appearance, demand, offer of judgment * * * and similar paper shall be served upon each of the parties affected thereby * * * *.**

**(b) * * * * Whnever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of the court. * * * *.**

**Rule 6**

**(b) * * * * When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 25, 50(b), 52(b), 59(b), (d) and (e), 60(b), and 73(a) and (g), except to the extent and under the conditions stated in them.**

**(c) The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existing or expiration of a term of court.**

The continued existence or expiration of a term of court in no way affects the power of a court to do any proceeding in any civil action which has been pending before it.

Rule 60

(a) * * * Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. * * *

(b) On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect;*** or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken.* * * *

Rule 73

* * * * (a) When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the United States or an officer or agency thereof is a party the time as to all parties shall be 60 days from such entry, and except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed.

A party may appeal from a judgment by filing with the district court a notice of appeal. * * * *

Rule 77(d) Notice of Orders or Judgments.
Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon every party affected thereby who is not in default for failure to appear, and shall make a note in the docket of the mailing. Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules; but any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as prmitted in Rule 73(a).
28 USC §2107

Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

In any action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.

The district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree.

# In the Supreme Court of the United States

OCTOBER TERM, 1965

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No. 856

ELAINE J. LORD, ET AL., PETITIONERS

*v.*

ROY T. HELMANDOLLAR, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

---

**BRIEF FOR THE RESPONDENTS IN OPPOSITION**

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**OPINION BELOW**

The opinion of the court of appeals (Pet. App. C) is reported at 348 F. 2d 780.

**JURISDICTION**

The judgment of the court of appeals was entered on June 10, 1965. A timely petition for rehearing was denied on September 8, 1965. On December 8, 1965, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including January 6, 1966. The petition for a writ of certiorari was filed on December 28, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).



305-206—66

## QUESTION PRESENTED

Whether the court of appeals correctly decided that the district court could not, 141 days after entry of a judgment, permit an untimely appeal by vacating and re-entering the judgment.

## STATUTE AND RULES INVOLVED

28 U.S.C. 2107 provides, in pertinent part:

> In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.
>
> * * * * *
>
> The district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree.

* * * * *

Rule 73(a), F.R. Civ. P., provides, in pertinent part:

> * * * in any action in which the United States or an officer or agency thereof is a party the time [within which an appeal may be taken] as to all parties shall be 60 days from such entry [of judgment], and except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed. * * *

Rule 77(d), F.R. Civ. P., provides, in pertinent part:

> Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail * * * upon each party who is not

in default for failure to appear * * *. Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules * * *. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 73(a).

## STATEMENT

This suit was instituted in the United States District Court for the District of Columbia against the Secretary of the Interior and other officials to invalidate Department of the Interior decisions declaring void petitioners' locations of placer mining claims on federal public lands in Arizona. Petitioners' locations had been determined to be void because they did not contain valuable mineral deposits.

Summary judgment was entered against petitioners by the district court on September 30, 1963. Prior to that time, on September 27, 1963, a copy of the proposed judgment was served by mail upon petitioners' Washington, D.C., counsel; a copy of the judgment was also promptly received by petitioners' Washington, D.C., counsel after the judgment was entered. (Pet. App. A; J.A. 78–79). No appeal was taken from this judgment by petitioners within the 60-day period provided by 28 U.S.C. 2107 and Rule 73(a) of the Federal Rules of Civil Procedure.

On February 4, 1964, more than four months after entry of summary judgment against petitioners in the district court, petitioners filed a motion with that court "to vacate and set aside the judgment or order

granting summary judgment * * * and to re-enter said judgment or order, and to allow the plaintiffs to file a Notice of Appeal and to pursue an appeal * * *." (J.A. 75). In support of their motion, petitioners alleged that while their Washington, D.C., counsel had been fully notified of the judgment against petitioners, he had failed, through inadvertence, to notify either petitioners or their Arizona counsel, who had not learned of the judgment in time to perfect a timely appeal (J.A. 76–79).

The district court granted petitioners' motion, vacated the judgment, and re-entered it on February 18, 1964 (Pet. App. B).[1] Petitioners then filed a notice of appeal. The court of appeals, in a *per curiam* opinion, dismissed the appeal for lack of jurisdiction. (Pet. App. C). The court held that the vacation and re-entry of the summary judgment had no effect upon the running of the time in which to appeal from that judgment; consequently, the appeal was untimely.[2]

## ARGUMENT

The time provided for taking an appeal from the judgment in this case was 60 days from the entry of judgment (28 U.S.C. 2107; F.R. Civ. P. 73(a), both reproduced *supra*, p. 2). In addition, "upon a

[1] No "relief from judgment" was sought by petitioners under Rule 60(b), F.R. Civ. P., and the district court did not purport to act under that provision.

[2] The government cross-appealed from the district court's order granting the motion to vacate and re-enter judgment. Having found that this order did not extend the time for appeal, the court of appeals dismissed the cross-appeal as moot (Pet. App. C., p. 5).

showing of excusable neglect based on a failure of a party to learn of the entry of judgment" the district court was permitted to "extend the time for appeal not exceeding 30 days from the expiration" of the original 60-day period (*ibid.*). The order of the district court vacating and re-entering the judgment here, however, purported to revive petitioners' right to appeal at a time commencing 80 days after the expiration of the original 60-day period and more than four months after entry of the judgment sought to be appealed from.*

As the court of appeals correctly held, such an additional extension is explicitly precluded by Rule 77(d) of the Federal Rules of Civil Procedure (*supra*, pp. 2–3), the last sentence of which specifically restricts extensions of time to appeal based upon failure of notice to the 30-day extension permitted in Rule 73(a). This change was made in Rule 77(d) in 1946 "to avoid such situations as the one arising in" *Hill* v. *Hawes*, 320 U.S. 520, the effect of which was "to give the district court power, in its discretion and without time limit * * * to vacate a judgment and reenter it for the purpose of reviving the right of appeal. This seriously affects the finality of judg-

*Summary judgment was entered on September 20, 1963. The original 60-day period expired on November 29, 1963. Petitioners' motion for vacation and re-entry was made on February 4, 1964, 66 days after the expiration of the original 60-day period. The judgment was re-entered on February 18, 1964, 80 days after the expiration of the original 60-day period and 140 days after entry of the original judgment.

ments" (Advisory Committee Note to Amendment of Rule 77, Approved December 27, 1946). The present case falls squarely within the purpose of this amendment to Rule 77(d).

In the circumstances of this case, moreover, there was no failure of notice warranting even the limited extension for "excusable neglect" under Rule 73(a). Petitioners' Washington, D.C., counsel admittedly received prompt notice of the judgment entered against petitioners. Such notice to counsel was full notice for all purposes under the Rules (Rule 5(a) and (b), F.R. Civ. P).[4] *Harris Lines* v. *Cherry Meat Packers,* 371 U.S. 215 (Pet. 6–8), and *Lieberman* v. *Gulf Oil Corp.,* 315 F. 2d 403 (C.A. 2), relied upon by petitioners (Pet. 14–16), are not to the contrary. In those cases, the appellants delayed their appeals in reliance upon orders of the trial court entered while appeals would have been timely. No such prejudicial reliance upon an order of the district court was present in this case.

---

[4] Petitioners' Washington, D.C., counsel, upon whom notice was served, is listed in the district court's civil docket as the attorney for petitioners. Rule 4 of the Rules of the United States District Court for the District of Columbia requires that local Washington, D.C., counsel be associated in actions instituted by counsel residing outside the District of Columbia. Thus an attorney who is a member of the Bar of the District of Columbia and who has an office in the District is required to be available to receive notice and service in pending cases.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
*Solicitor General.*

EDWIN L. WEISL, JR.,
*Assistant Attorney General.*

S. BILLINGSLEY HILL,
RAYMOND N. ZAGONE,
*Attorneys.*

JANUARY 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966

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FILED
APR 23 1966
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

October Term, 1965
No. 856

BLAINE J. LORD, EDYTHE M. KERBER, et al.,
Petitioners,

versus

ROY T. HELMANDOLLAR, ETC., et al.,
Respondents.

On Writ of Certiorari to Court of Appeals
For the District of Columbia Circuit

## PETITION FOR REHEARING

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ROGER P. MARQUIS,
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AYMOND N. ZAGONE,
EDMUND B. CLARK,
Counsel for Respondent

IN THE

# Supreme Court of the United States

October Term, 1965

No. 856

---

BLAINE J. LORD, EDYTHE M. KERBER, et al.,
Petitioners,

versus

ROY T. HELMANDOLLAR, individually and as Manager of the Phoenix, Arizona Land Office, Bureau of Land Management, et al.,
Respondents

---

**On Writ of Certiorari to Court of Appeals For the District of Columbia Circuit**

---

## PETITION FOR REHEARING

Petitioners present their petition for a rehearing of this Court's order dated February 28, 1966, denying the petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit, and, in support thereof, respectfully shows the following

*Grounds for Rehearing*

**1. Court of Appeals Reading of the Language of the Law Mistakenly Treated as Finding of Trial Court.**

This Court would have granted the Writ of Certiorari readily had it taken notice that the lower court's decision rested not on the finding of the United States District Court, in granting the petitioner's motion to vacate and re-enter the judgment, but solely and entirely on the lower court's reading of the language of the law, and on a finding of another district court.

In its opinion, the Court of Appeals for the District of Columbia says:

> Appellants rely on **Hill v. Hawes,** 320 U.S. 520 (1944) to support their contention that the time for appeal should be measured from the date on which the District Court granted their motion to vacate and re-enter judgment. In **Hill v. Hawes, supra,** the District Court vacated and re-entered its original judgment after the time for appeal had expired on the ground that the clerk of the court had failed to notify the plaintiff of the entry of the original judgment, as the clerk was, and still is, required to do by Rule 77(d), Fed. R. Civ. P. The Supreme Court, reversing this court, held that the District Court acted with its power * * * (Opinion p. 3-4, Appendix C)

The trial court vacated and re-entered its original judgment not on the ground which the Court of Appeals had in mind.

The trial court Order states:

> The plaintiffs' motion for order to vacate and re-enter judgment or order filed in the above-entitled cause having been given careful consideration, together with defendants' opposition thereto, also filed herein, it is by the Court, this 17th day of February, 1964,
>
> ORDERED, That the plaintiffs' motion for order to vacate and re-enter judgment or order be, and is hereby, granted. J. TAMM, JUDGE.
>
> (Joint Appendix, p. 81-2).

The plaintiffs' motion presented the trial court a number of reasons for granting the relief prayed for:

—that plaintiffs and their attorney failed to receive notice of entry of judgment and of the judgment;

—by reason of inadvertence and excusable neglect occasioned by unusual circumstances and

—by the confusing fact that their attorney actually concerned and who argued case had expected to be served with the judgment or notice of entry of judgment;

—that it shall be **in the interest of justice, under the circumstances.** (Joint Appendix, p. 75-76)

The affidavits filed in support thereof substantiated largely the unusual circumstances which would have sufficiently addressed themselves to the equitable jurisdiction of the trial court which "seeks justice rather than technicality, truth rather than evasion, common sense rather than quibbling," and which "will not suffer a wrong to be without a remedy." In all the proceedings in the District Court, the same judge presided.

It goes without saying that the trial court did not grant plaintiffs' motion to vacate and re-enter judgment on any particular ground, but **on the whole reasons and supporting matters presented to it and upon what the judge personally knew himself.**

Was the trial court competent to grant plaintiffs' motion? We contended in the court below that it was competent and referred ourselves to the language of this Court in **Hill v. Hawes,** supra, especially to the following passages:

"These rules do not in terms apply to the situation here present, as the court below held. **But we think it was competent for the trial judge,** in view that the petitioner relied upon the provisions of Rule 77(d) with respect

to notice, and, **in the exercise of a sound discretion, to vacate the former judgment and to re-enter a new judgment** of which notice was sent in compliance with the rules." (Boldface supplied)

Thusly, petitioners contended "that the time for appeal should be measured from the date on which the District granted their motion to vacate and re-enter judgment" since the trial court was competent in the exercise of a sound discretion, we feel. It was competent and has the inherent power, under its equitable jurisdiction, if not under any Rules, in the interest of justice, to vacate a former judgment and re-enter a new judgment, under such terms as are just and put justice into effect.

But, obviously, the court below overlooked to consider that fact. Its attention was narrowed to the idea "that the petitioner relied upon the provisions of Rule 77(d) wih respect to notice" as the petitioner in Hill v. Hawes case did in the district court in which that case was tried. With that idea fixed in the mind of the Court of Appeal for the District of Columbia, it overturned the ruling of the District Court and dismissed petitioners' appeal on matter of lack of jurisdiction.

It did so, without any showing at all that the trial court in granting the motion to vacate the judgmen and to re-enter a new judgment had abused its discretion. As this Court well know, the court below can not do just that.

A petition to vacate a judgment is addressed to the sound legal discretion of the trial court, and its determination will not be disturbed except for abuse of discretion, and this is particularly true in the instance where the judge passing on the petition has presided in the litigation in which the judgment was entered. (Parker v. Checker Taxi Co., Inc. (CA 7th, 1956), cert. den. (1957) 353 U.S. 922, 77 S Ct. 681).

If the trial court was competent in the exercise of its discretion to vacate the former judgment and to re-enter a new one, upon the facts and reasons before it, and no showing had been shown at all that it had abused its discretion, its act, not having been assailed, stands valid. Petitioners may appeal from the re-entered judgment—such judgment, the granting of summary judgment in favor of defendants and against plaintiffs, petitioners herein, being appealable under the law. Petitioner then duly filed a notice of appeal. If the said action of the trial court in effect unabled petitioners to pursue an appeal, a court seeking within its equitable power to do justice "ought to do justice completely, and not by halves."

**2. Cynical Doctrine of Justice Unwittingly Sanctioned.**

The Court of Appeals has applied a restrictive rule and taken up the matter of jurisdiction, when it had heard the parties mainly on the merits of the cause, which will likely to plague the courts of the United States, and to embarrass this Court. This Court has, by denying a writ of certiorari, unwittingly countenanced that a governmental decision, even if corrupt, is right. This situation came about from the following facts:

The complaint filed in the District Court, seeking review of the decision of the governmental agency and the Secretary of the Interior, alleged, as a material issue, that Hon. Stewart L. Udall, from the inception, has a personal and professional interest in the outcome of the case, attaching thereto exhibit, and that the administrative officers, from the Land Office, Phoenix, Arizona, to those of the administrative appeal officers, exercising quasi-judicial power, could not have exercised it independently and free of the influence of the manifest conflict of interest held by the

Secretary of the Interior. The issue is essential in the outcome of the review. It becomes more so, where the evidence on the other material issue, the matter of mineralization necessary to a valid mineral discovery, preponderates toward establishing valid mining claims in favor of the petitioners.

The issue was taken up in the trial court. Petitioners and the government argued it. The trial court inquired of the government counsel: what he would say about the allegation that the Secretary of the Interior was personally interested in the outcome of the case? The things he said were not borne out by the record; but his summing up is startlingly significant:

> "Furthermore, the evidence is overwhelming in support of the decision; and even if it were corrupt, it would still be right." (Joint Appendix, p. 72).

In the Court of Appeals, the issue came up and argued. It loomed important when the petitioners showed how the evidence in the whole case tended to establish mineralization sufficient for valid mining claims, and the Court wanted to know whether petitioners have evidence to support the allegations concerning the matter of the Secretary of the Interior's personal and professional interest. Petitioners assured the Court they have and an exhibit was attached to the complaint, and that the record contains matters we have referred to in "Appellants Point No. 3" in Appellants' Opening Brief.

The question on appellate jurisdiction was hardly touched upon.

Determination of a case on its merits is universally favored. The court below should have been more loathe to disturb the ruling of the District Court. It could have required

the appellees to show that the trial court had abused its discretion in granting the motion to vacate and re-enter the judgment, and, in the absence of any showing, deny the cross-appeal, as it should have done, and determine the case on its merits. The Court of Appeals itself could have exercised a sound legal discretion.

By doing so, the Court of Appeals could have done double service, rather than double disservice. It could have resolved the issue concerning the claimed personal and professional interest of the Secretary of the Interior in the outcome of the cause, upon the adequacy of evidence or the insufficiency of it. It could have then explained away any cloud over that officer. It could have repudiated the principle held by the Department of Justice

> that a decision "even if it were corrupt, it would still be right."

By taking the expedience, as it did in its decision, and retreating from facing the issues on the merits, when it could just as well be guided by the spirit and the equitable considerations behind **Harris Truck Lines, Inc. v. Cherry, Thompson v. Immigration & Naturalization Service, Wolfson v. Hankin,** and cases conformably decided by other Courts of Appeal, which we cited in the petition for writ of certiorari, it lends versisimilitude to the conflict of interest that the Secretary of Interior is alleged to have, and to the principle that a decision even if it were corrupt it would still be right.

The Court of Appeals could have burnished anew the shield of integrity of the courts. Lawyers all over the country, comparing the "showing of unique circumstances" in the present case and other elements present to fit the spirit of **Harris** and other cases above, could not help make speculative inferences, which may not be altogether flattering.

And to the public, erroneous it may be, be left the idea that a decision "even if it were corrupt, it would still be right," and the shadow of Secretary of the Interior Stewart L. Udall upon the shield.

*Conclusion*

The probability that the petitioners' appeal has been dismissed under misapprehension and in an unwise and unjudicious restricture is so great that it is respectfully urged that this petition for a rehearing be granted, and, that, upon further consideration, writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit.

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**CERTIFICATE OF COUNSEL**

I, JOSE DEL CASTILLO, Esq., counsel for the above named petitioners, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58, subdivision 2, of the Rules of this Court.

Jose del Castillo

Counsel for Petitioners